# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heyman v. South Coast British Columbia Transportation Authority,* 2013 BCSC 1724

Date: 20130919
Docket: M112172
Registry: Vancouver

Between:

**Russell Heyman**

Plaintiff

And

**South Coast British Columbia Transportation Authority doing business as Translink, Corporate District of West Vancouver and Simon Stewart Cooper**

Defendants

Before: The Honourable Mr. Justice Skolrood

## Reasons for Judgment

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|---|---|
| Counsel for the Plaintiff | W. Mussio<br>T. C. Schapiro |
| Counsel for the Defendants | K. Armstrong |
| Place and Date of Trial: | Vancouver, B.C.<br>August 26 & 27, 2013 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 19, 2013 |

## Overview

[1] The plaintiff, Russell Heyman, claims damages for personal injuries resulting from an incident that occurred on April 26, 2010 at the Park Royal Mall in West Vancouver when he was struck by a bus. The bus was part of the Blue Bus fleet that operates in and around West Vancouver and was owned and operated by the defendant Corporate District of West Vancouver under a contract with the defendant South Coast British Columbia Transportation Authority, also known as Translink. The defendant Simon Cooper was the driver of the bus at the time of the accident.

[2] By way of an order dated November 20, 2012, liability and damages were severed and it was directed that the trial on the issue of liability proceed first. These reasons for judgement address liability only.

## The Accident

[3] The accident occurred on Centre Road which runs through the parking lot of the Park Royal Mall. It is common ground between the parties that at approximately 8:00 a.m. on the morning of April 26, 2010, a bus driven by Mr. Cooper came into contact with Mr. Heyman. While many of the facts surrounding the accident are uncontroverted, the parties differ on certain specific details and on the central issue of who is liable for the accident.

## Mr. Heyman's Version of Events

[4] Mr. Heyman was 41 years old at the time of trial. He testified that he is six feet tall and weighs about 300 pounds. He is employed as an animator and an animation instructor at the Visual College of Art and Design in Vancouver.

[5] Mr. Heyman testified that on the morning of April 26, 2010, he had been called into work at the college where he is employed to cover for another instructor. His work was scheduled to begin at 8:30 a.m.

[6] He said that he was wearing casual business style clothes including light hiking boot type shoes. He was carrying a laptop computer bag containing his laptop and some other school materials.

[7] His wife is employed at a store in the Park Royal Mall so she gave him a ride to the mall where he intended to catch a bus into downtown Vancouver. That bus ride normally takes about 20 minutes.

[8] Photographs of Centre Street at and around where the accident occurred were entered into evidence. Certain photographs show a number of businesses lining the street including, moving from east to west, an Autoplan insurance agency, a Booster Juice store, a parkade located under a Staples store and what appears to be a Winners store, with two driveway entrances, and then the Five Guys restaurant. Past the Five Guys restaurant it is not possible to make out the names of the businesses located along the street but in the distance a green awning can be seen which the parties agreed was in front of a Starbucks.

[9] The photographs also show a bus stop located directly in front of the Five Guys restaurant and it was agreed that there is another bus stop located down the street in front of the Starbucks.

[10] Mr. Heyman testified that after being dropped off by his wife, he saw the bus at the Starbucks bus stop down the street and he thought that he could catch the bus at the next stop, located in front of the Five Guys restaurant. It was not clear from his evidence where he was when he first saw the bus.

[11] Mr. Heyman said that he started to jog towards the bus stop. He saw the bus leave the Starbucks station so he began picking up his pace when he was in front of the Booster Juice store.

[12] He said that he saw the bus come to a stop in front of the Five Guys restaurant and it was picking up passengers. As he was running towards the bus, he was waving at it to try to get the driver’s attention. However, he said that he did not make eye contact with the driver because there was too much glare on the front windshield of the bus. Mr. Heyman said that right when he arrived at the Five Guys bus stop, the bus pulled away.

[13] He testified that he put up his hand to wave down the bus and it came into contact with the side of the bus. The contact caused him to spin around and fall to the ground. His ankle was run over by the rear of the bus and he also suffered a broken shoulder. He denied that he tried to punch the bus, rather he described it as him simply trying to signal the bus to stop.

[14] Mr. Heyman testified that he was winded from running and was stressed about being late. He said he was stunned by the fact that the bus would leave right when he arrived at the bus stop. He said that he believes that he was stationary when he was struck and that he never left the sidewalk. While somewhat uncertain about where he was when he was struck, he believes it was right in front of the Five Guys restaurant close to the bus stop.

[15] Mr. Heyman denied that, after the accident, he told the bus driver that what he did was stupid, that he should not have done it and that he was sorry.

**Mr. Cooper's Version of Events**

[16] The defendant Mr. Cooper testified that at the time of the accident on April 26, 2010, he had been employed as a bus driver for West Vancouver Transit since 1981. He recently retired from that position in January of this year.

[17] On the morning of the accident, Mr. Cooper started his shift at 5:30 a.m. He recalls that he was driving the No. 251 bus which does a loop through downtown Vancouver then back along the Upper Levels Highway. He indicated that the Park Royal stop is one of the busiest along the route. He also indicated that during the morning rush hour, buses heading into Vancouver come along every 5 to 7 minutes.

[18] Mr. Cooper testified that his route that morning required him to drive east along Centre Road in Park Royal. He stopped his bus at the stop located outside of the Five Guys restaurant. Once all of the passengers waiting at the stop were loaded, he closed the doors to the bus and began to move forward. Mr. Cooper indicated that he saw a pedestrian, Mr. Heyman, running towards the bus, but he said that it was company policy that once all of the people waiting at a stop are

loaded, he is supposed to close the doors and move ahead. He is not permitted to stop away from the bus stop to pick up people who may be running to catch the bus.

[19] Mr. Cooper testified that he first saw Mr. Heyman while he was still stopped at the bus stop. However, Mr. Heyman was still quite far away which is why he did not wait for him. He said that he motioned for Mr. Heyman to catch the next bus but he does not know if Mr. Heyman saw him do so. Mr. Cooper was cross-examined on the fact that in his examination for discovery, he testified that he did not see Mr. Heyman until after he had pulled away from the stop. Mr. Cooper insisted that his evidence at trial was accurate and that he was mistaken in what he said at discovery.

[20] Mr. Cooper said that after he pulled away from the stop, he heard a bang on the side door to the bus and saw a flash. That occurred within a second of when he pulled forward. He believes that Mr. Heyman used a fist to bang on the side of the door given the sound that it made. He did not however see Mr. Heyman actually strike the bus other than the flash he described. He did not see Mr. Heyman fall.

[21] Mr. Cooper did not immediately slow down or stop the bus on hearing the bang to the door. He only stopped when a passenger called out that someone had fallen under the bus.

[22] Mr. Cooper testified that after stopping the bus, he got out and spoke to Mr. Heyman who he believes was lying in the roadway. He says that Mr. Heyman said to him something to the effect of “that was a stupid thing to do - I should not have done that.”

[23] In cross-examination, Mr. Cooper was taken to extracts from the West Vancouver Transit Policies and Procedures Manual. He agreed that there are numerous portions of the manual that emphasize the precedence of safety over all other concerns. For example, Section G 3, entitled “Safety First-Proceed Safely; Take no Chances” states:

> To arrive safely is more important than to arrive on time.

> The obvious safety of passengers, employees, travelers and pedestrians on the streets and highways must be given precedence over every other consideration.

[24] Section O 25 of the manual deals with bus zones and states that:

> Bus zones or stops are provided throughout the transit system to accept or discharge passengers. Operators must stop at recognized bus stops/zones to accept or discharge passengers. However, these are not intended to overly restrict the operator to those locations only. Rigid procedures do not allow for legitimate concerns.

[25] Section O 25 (d) also directs that drivers must "be alert to waiting passengers, especially those that appear to be standing very close to the curb and potentially in danger of being struck by the bus."

[26] Mr. Cooper agreed in cross-examination that the manual does not include a policy requiring drivers to immediately close the doors to the bus and leave the stop as soon as there are no more passengers waiting at the stop. He indicated that policy was something that drivers were told by management.

[27] The rigidity with which Mr. Cooper adhered to that policy is illustrated by an exchange in cross-examination where he agreed that if a pedestrian is even one foot away from the bus stop when the doors close, the bus leaves.

[28] Mr. Cooper also agreed that he did not do anything to avoid contact with Mr. Heyman. Specifically, he did not slow down, he did not pull into the other lane to give a wider berth and he did not honk his horn.

**The Independent Witnesses**

[29] The court heard evidence from two independent witnesses.

[30] Blake Goddard is the owner and operator of the Booster Juice store located down the block to the east of where the accident occurred. He testified that on the morning of April 26, 2010, at about 8:00 a.m., he was in front of his store putting out a table and chairs and placing a sign on the sidewalk.

[31] Mr. Goddard testified that he noticed a pedestrian running towards the bus stop located in front of the Five Guys restaurant down the block. He described the pedestrian as wearing business attire and carrying a briefcase. He also said that the pedestrian was a larger man and that he was not running terribly fast.

[32] Mr. Goddard heard the man yell something like “hey” to the bus and he saw him waving at the bus. It was apparent to Mr. Goddard that the pedestrian was running to catch the bus.

[33] As the pedestrian got closer to the bus, Mr. Goddard said that the bus closed its doors and started to pull forward. The pedestrian put his hand out which came into contact with the bus. Mr. Goddard believes that the pedestrian’s hand touched the front window of the bus. He said it was almost like the pedestrian was trying to hit the front of the bus with an open hand to get it to stop.

[34] Mr. Goddard said that the contact with the bus caused the pedestrian to spin around and fall down, with his torso on the sidewalk and his legs off the curb in the street. The back of the bus ran over the pedestrian’s leg. According to Mr. Goddard, at no time prior to the contact did the pedestrian leave the sidewalk and enter the roadway.

[35] Mr. Goddard put the point of contact as just past the driveway into the parking lot right before the Five Guys restaurant. While no specific measurements were provided, from the photos entered into evidence that spot appears to be at least some 20 feet from the sign marking the Five Guys bus stop.

[36] Mr. Goddard testified that he did not hear the bus sound its horn nor did he see the bus take any evasive action. He agreed in cross-examination that the road is quite narrow in front of the bus stop and that there is not much room for anything else other than the bus in that east bound lane.

[37] Donna Sharpe also testified. Ms. Sharpe is an insurance broker who works at the insurance agency located just east of the Booster Juice store. Ms. Sharpe testified that on the morning of April 26, 2010, she was parking her car in the parking

lot across the street from the agency and the Booster Juice store. As she was getting out of her car, she saw a pedestrian across the street running along the sidewalk towards the Five Guys bus stop.

[38] The bus, which had been stopped at the bus stop, started to move forward. She says that she then saw the pedestrian put his hand up and take a small jump towards the bus in an attempt, as she described it, to knock on the side of the bus. She testified that she recalls thinking at the time how foolish that was and that the pedestrian could be struck by the bus and injured.

[39] The bus then crossed in front of her line of sight and she did not actually see the pedestrian fall and get run over by the bus. Ms. Sharpe could not estimate how far the bus had moved from the bus stop to the point of contact but, consistent with Mr. Goddard's evidence, she placed the point of contact down the street somewhat from the bus stop.

**Factual Findings Concerning the Accident**

[40] One of the key issues in determining liability is where the contact between Mr. Heyman and the bus occurred and how far the bus had moved away from the bus stop when it struck Mr. Heyman.

[41] Mr. Goddard put the point of contact just past the driveway adjacent to the Five Guys restaurant. This evidence was supported by Ms. Sharpe. As noted, that is likely some 20 feet down the block from the bus stop. Neither Mr. Heyman nor Mr. Cooper were certain about the point of contact although Mr. Cooper described it as occurring a "split second" after the bus pulled away from the stop. On balance, I accept the evidence that it occurred where Mr. Goddard says it did.

[42] That is relevant because it suggests that the bus was well in motion when Mr. Heyman came into contact with it and is inconsistent with Mr. Heyman's evidence that the bus was still stationary right until the point that he arrived at the bus stop. The force of the contact with Mr. Heyman, which caused him to spin

around and fall, is also more consistent with him having reached out to flag or strike the bus when it was well underway.

[43] I do not accept that Mr. Heyman somehow leaped into the bus or jumped up to strike it, but I do accept that he was waving at the bus trying to get the driver's attention and that he came into contact with the bus which ultimately caused him to fall. Mr. Heyman testified that after running towards the bus and then seeing it leave without him, he was stunned. I find that he was frustrated and that in his frustration he reached out to bang on the bus in hopes of making it stop.

## Analysis

### Governing Legal Principles

[44] Both parties refer to s. 181 of the BC *Motor Vehicle Act,* R.S.B.C. 1996, c. 318, which provides that the driver of a vehicle must:

> (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
>
> (b) give warning by sounding the horn of the vehicle when necessary; and,
>
> (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[45] Section 179 of the *Motor Vehicle Act* deals with the rights of way as between vehicles and pedestrians. Section 179 (2) states:

> A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

[46] Section 180 then provides:

> When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

[47] None of these sections apply directly to the circumstances of this case because it is common ground that Mr. Heyman was not in the roadway at the time of the accident. Nonetheless, the legislative provisions reflect the fact that both drivers

and pedestrians have duties when on or in the vicinity of public roadways to keep a proper look out and to take reasonable precautions.

[48] The courts have recognized these mutual duties as well. For example, in *Nelson (Public Trustee Of) v. Shinske*, (1991), 62 B.C.L.R. (2d) 302, [1992] 2 W.W.R. 547 (S.C.) [*Nelson*], Mr. Justice Fraser at para. 19 cited Cartwright J. of the Supreme Court of Canada in *Johnson National Storage Ltd. v. Mathieson,* [1953] 2 D.L.R. 604 [*Johnson National Storage*] at 613 to the effect that: "There is a duty upon motorists and pedestrians alike to be vigilant for a reasonably apparent potential hazard."

[49] Counsel for Mr. Heyman cited a number of authorities that support the proposition that the standard of care applicable to public carriers is higher than for other motorists.

[50] Perhaps the most often cited source for that principle is the Supreme Court of Canada decision in *Day v. Toronto Transportation Commission,* [1940] SCR 433 [*Day*] where Mr. Justice Hudson said at 441:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree…In an old case of *Jackson v. Tollett*, the rule was stated by Lord Ellenborough, at p. 38, as follows:
>
> > Every person who contracts for the conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.
>
> [Footnotes omitted.]

[51] That principle has been endorsed in a number of British Columbia authorities. In *Prempeh v. Boisvert,* 2012 BCSC 304 at para. 18*,* Madam Justice Dardi said this with respect to *Day:*

> The principles articulated in *Day* have been interpreted by the courts in this province as endorsing the following analytical approach-once a passenger on a public carrier has been injured in an accident a *prima facie* case of negligence is raised and it is for the public carrier to establish that the

> passenger's injuries were occasioned without negligence on the part of the defendant or that it resulted from a cause for which the carrier was not responsible: *Planidin v. Dykes,* [1984] B.C.J. No. 907 (Q.L.) (S.C.); *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.,* 2006 BCSC 656 at para. 26.

[52] Mr. Heyman relies on the *Prempeh* decision as well as the *Planidin* and *Visanji* decisions cited by Madam Justice Dardi and the decision of the Court of Appeal in *Wang v. Horrod* 48 B.C.L.R. (3d) 199, [1998] 9 W.W.R. 280 [*Wong*].

[53] As noted by counsel for the defendants, each of these cases involves circumstances in which the injured plaintiffs were passengers of the public carrier. In his submission, the shifting onus principle set out in those cases does not apply in this case given that Mr. Heyman was never a passenger on the bus.

[54] In response, counsel for Mr. Heyman cites the decision of this court in *Lawson v. B.C. Transit et al.,* 2002 BCSC 1438 [*Lawson*]. There the plaintiff was involved in two separate accidents involving public buses. In the first accident, the plaintiff was attempting to board a bus when she collided with a passenger who was disembarking, causing the plaintiff to fall backwards onto the sidewalk.

[55] In considering the liability of the bus driver, Madam Justice Humphries cited *Wang* as accurately summarizing the law governing public carriers. However, she went on to find that the driver in *Lawson* did not breach a duty owing to the plaintiff. In her view, to hold the driver liable for the unexpected actions of another passenger would make him an insurer.

[56] Counsel for Mr. Heyman says that Mr. Heyman was in a similar position to the plaintiff in *Lawson* in the sense that he was attempting to board the bus when the accident happened. However, as I have found that in fact the bus was well under way when Mr. Heyman's hand came into contact with it, the *Lawson* case is in my view distinguishable.

[57] I note that there are other authorities dealing with bus-pedestrian accidents in which the court did not apply the analytical approach flowing out of the *Day* line of cases, for example *Mitchell v. Lockhart,* 1987 CarswellBC 1500, [1987] B.C.J.

No. 1466 (S.C.), and *Peter v. Anchor Transit Ltd.,*(1981), 27 B.C.L.R. 138 (C.A.) [*Peter*].

[58] In *Whelan v. BC Transit,* 2012 BCSC 1397 [*Whelan*], Mr. Justice Schultes considered a claim brought by a pedestrian who was struck from behind by a bus when he stepped off the curb and onto the road to avoid other pedestrians on the sidewalk. While Mr. Justice Schultes cited the *Wang* decision, he did so for the purpose of identifying the standard of care imposed on a bus driver. He did not otherwise apply the *Day* approach but rather assessed the bus driver's liability in accordance with what might be described as a more conventional negligence analysis. Specifically, he considered whether the bus driver breached the applicable standard of care, and, having found that the driver did so, he then considered whether the plaintiff was contributorily negligent. In the end, Mr. Justice Schultes apportioned liability 60% to the plaintiff pedestrian and 40% to the bus driver.

[59] In my view, a similar analytical approach is warranted in this case. However, before turning to the issue of whether Mr. Cooper breached the standard of care, it must first be determined whether in fact he owed Mr. Heyman a duty of care, given that Mr. Heyman was not in fact his passenger at the time.

[60] In *Wang*, Madam Justice Rowles provided a useful summary of the distinction between the duty of care and the standard of care, albeit in the context of a passenger case. She said at paras. 25 and 26:

> That reasonable foreseeability is the basis for establishing a duty of care, is well established. In *The Law of Torts*, 8th ed. (1992), Fleming supports the view that "duty" is more appropriately reserved for the problem of whether the relation between the parties, such as manufacturer and consumer or occupier and trespasser, warrants the imposition upon one of an obligation of care for the benefit of the other, and that it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation.
>
> That public carriers owe a duty of care to their passengers based on the reasonable foreseeability test is uncontentious.

[61] She went on to say at paras. 29-29:

> The standard of care, unlike the duty of care and remoteness of damages, does not refer to what is reasonably foreseeable. Instead, it is based on what the reasonably prudent person would do in the circumstances.
>
> In this case, the standard of care imposed on the bus driver is the conduct or behaviour that would be expected of the reasonably prudent bus driver in these circumstances. The test is an objective one and takes into consideration both the experience of the average bus driver and anything the driver knew or should have known.

[62] Finally, Madam Justice Rowles noted at para. 30 that in considering what a reasonably prudent bus driver would do in the circumstances, the question is whether there is a real risk of harm that could reasonably be avoided: "The "real risk" test involves balancing the seriousness of the potential risk and the likelihood of its occurrence on one side with the ease and consequences of avoiding the risk on the other side..."

[63] While again Madam Justice Rowles' comments were in the context of a passenger case, I think that they are equally applicable to a pedestrian case like the one at bar.

[64] In terms of the duty of care, I do not understand the defendants to argue that that the driver, Mr. Cooper, owed no duty to Mr. Heyman. In my view, the existence of a duty is clear. As noted, the courts in cases such as *Nelson* and *Johnson National Storage* make it clear that both drivers and pedestrians have a duty to be aware of potential hazards. Further, the West Vancouver Transit Policies and Procedures Manual specifically directs drivers to exercise extra caution when entering and leaving a bus zone and to be aware of any pedestrians in the vicinity of the bus.

[65] Mr. Cooper testified that it is not uncommon for people to run towards the bus in an attempt to catch it. Further, he clearly saw Mr. Heyman running towards the bus and understood that he was doing so with a view to catching the bus. As the evidence established, Mr. Heyman is a large man and not terribly athletic and his approach to the bus was undoubtedly awkward, particularly given that he was

attempting to run while carrying his laptop bag. In the circumstances, it was reasonably foreseeable that harm might come to Mr. Heyman in the event that Mr. Cooper failed to take reasonable precautions. I therefore find that Mr. Cooper owed Mr. Heyman a duty of care.

[66] The analysis then turns to whether Mr. Cooper failed to meet the standard of care of what would be expected of a reasonably prudent bus driver in the circumstances. This questions turns on whether it was reasonable for Mr. Cooper, in compliance with what he understood company policy to be, to simply close the doors of the bus and accelerate away from the bus stop notwithstanding Mr. Heyman's approach.

[67] In my view, reliance on this alleged policy is no answer to the claim that Mr. Cooper breached the standard of care. I say alleged policy because it is not set out anywhere in writing, notwithstanding that West Vancouver Transit has in place an extensive policy manual setting out detailed operational practices and policies. That said, I have no reason to question Mr. Cooper's evidence that drivers are instructed to leave once there is no one else waiting at a bus stop.

[68] However, Mr. Cooper's conduct is not to be measured against a general policy, but rather must be considered in light of the circumstances that presented at the time. As noted by Madam Justice Rowles in *Wang*, the question is whether there was a real risk of harm that could reasonably be avoided.

[69] In my view, Mr. Heyman approaching the bus in an awkward run waving his arms in the air with a view to getting the driver's attention and hopefully having the bus stop so he could board, presented a real risk of harm. I note in particular the fact, as pointed out by counsel for the defendants, that the road on which the bus was situated was quite narrow, in fact not much wider than the bus itself. That put the bus in close proximity to pedestrians on the adjacent sidewalk and heightened the need for vigilance on Mr. Cooper's part. Again, that is particularly so given the manner in which Mr. Heyman was approaching.

[70] The fact that Mr. Heyman was approaching from the front and that Mr. Cooper saw him, distinguishes this case from *Peter,* cited by the defendants, where the Court of Appeal found that a bus driver was not liable for injuries suffered by a child who approached the bus from the rear and where the driver made reasonable efforts to keep a look out.

[71] Counsel for the defendants submitted that there was nothing negligent in Mr. Cooper simply continuing on his way when he saw Mr. Heyman approaching. He notes the evidence of Mr. Goddard that people run for the bus all the time. Sometimes they make it and sometimes they don't. He submits that Mr. Heyman did not present a hazard and that accordingly, there was no need for Mr. Cooper to sound his horn pursuant to s. 181 (b) of the *Motor Vehicle Act*, or to take evasive action, for example by pulling further into the oncoming lane.

[72] That however does not account for the particular manner in which Mr. Heyman approached the bus. For the reasons already discussed, I find that Mr. Heyman did in fact present a real risk or hazard.

[73] The second aspect of the "real risk" test is whether that risk could reasonably be avoided. In my view the answer to that question is yes. That is not to say that Mr. Cooper was obliged to stop and let Mr. Heyman on the bus in order to avoid the risk. However, the prudent course of action would have been to at least slow down and to maintain awareness of where Mr. Heyman was in relation to the bus. Instead, Mr. Cooper chose to simply accelerate away from the bus stop.

[74] I therefore find that Mr. Cooper's conduct fell below what was required of a reasonably prudent bus driver in the circumstances.

**Contributory Negligence**

[75] I now turn to the question of whether Mr. Heyman was contributorily negligent. In *Bradley v. Bath,* 2010 BCCA 10 at para. 25, Mr. Justice Tysoe adopted the description of contributory negligence set out in John G. Fleming, *The Law of Torts,* 9th ed. (Sydney: LBC Information Services, 1998) at 302 as follows:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt...

[76] Where it is shown that a plaintiff was contributorily negligent, then the court must also consider the proper apportionment of liability as between the parties. In this regard, s. 1(1) of the BC *Negligence Act,* R.S.B.C. 1996, c. 333, provides:

> If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[77] In *Karran v. Anderson,* 2009 BCSC 1105, Mr. Justice Cohen described the approach to apportionment in these terms at paras. 106 and 107:

> [106] The *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1(1), requires that apportionment of liability must be made on the basis of "the degree to which each person was at fault". As stated in *Cempel v. Harrison Hot Springs*, [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 at para. 19 (C.A.), the assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness. Courts must gauge the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all of the circumstances.
>
> [107] In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel,* courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.,* 2000 BCCA 505 at para. 46. Finch J.A. (as he then was) described the range of blameworthiness, as follows:
>
> > Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[78] While each case must be decided on the basis of its own unique facts, it is useful to consider the apportionment of liability in other cases with somewhat similar facts.

[79] In *Whelan,* where the pedestrian was struck by a bus when he stepped off the curb into the road to avoid other pedestrians on the sidewalk, the court apportioned liability 60% to the plaintiff pedestrian and 40% to the driver on the basis that the driver had a momentary lapse of care whereas the conduct of the pedestrian reflected a much higher degree of carelessness.

[80] In *Yip v. Melton,* 1995 CanLII 1624, [1995] B.C.J. No. 1293 (S.C.), the plaintiff was standing at the front of a crowd of people at a bus stop. The evidence was that he was standing very close to the curb, with one foot over the curb and he was struck by the bus when it pulled into the bus stop. The plaintiff was looking away when he was struck.

[81] The court found that the plaintiff had failed to take reasonable care for his own safety and was primarily at fault for the accident. Liability was apportioned 75% to the plaintiff and 25% to the driver.

[82] In the case at bar, I find that, as between Mr. Heyman and Mr. Cooper, Mr. Heyman bears a greater degree of responsibility for the accident. On the evidence, I have found that Mr. Heyman struck a moving bus after it had left the bus stop. That contact was deliberate and demonstrates a failure on Mr. Heyman's part to take reasonable care for his own safety.

[83] Mr. Cooper's conduct was also deliberate in the sense that he accelerated away from the bus stop even though he saw Mr. Heyman approaching the bus. Nonetheless, I would characterize that conduct as more of a lapse in judgment in failing to recognize or acknowledge a hazard that presented which, in my view, attracts a lower degree of fault or blameworthiness than the person who created the hazard.

[84] In the circumstances, I find that Mr. Heyman was 60% responsible for the accident and Mr. Cooper 40%.

[85] Unless there are circumstances that I am not aware of, costs should be apportioned in accordance with s. 3(1) of the *Negligence Act* such that Mr. Heyman is entitled to receive 40% of his costs at Scale B from the defendants: *Whelan* and *Rimmer v. Township of Langley,* 2007 BCSC 340.

"Skolrood J."